NO. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM 1992

C. LOUIS NOACK and CAROLYN S. NOACK,
Petitioners,

v.

STATE FARM FIRE and CASUALTY COMPANY and JIMMY YOUNG,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Michael R. Carr
Attorney at Law
TBA #03861500
902 Main St.
Humble, Texas 77338

OF COUNSEL:

Lennon C. Wright
TBA #22048600
Wright & Howerton
1150 Two Houston Center
Houston, Texas 77010
(713) 654-7878
(713) 654-7881: FAX

Attorneys for Petitioners

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Now come Petitioners and through the undersigned file this Supplemental Appendix to the Original Petition for Certiorari heretofore filed. Submitted herewith as Appendix "C" is the Memorandum Of The United States District Court Southern District Of Texas entered April 2, 1992.

Respectfully Submitted

Michael R. Carr
902 Main St.
Humble, Texas 77338
(713) 540-1220

Of Counsel:

Lennon C. Wright
Wright & Howerton
1150 Two Houston Center
Houston, Texas 77010
(713) 654-7878
(713) 654-7881: FAX

Attorneys For Petitioners

SUPPLEMENTAL
APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
APR 02 1992
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By Deputy: /s/ illegible

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. LOUIS NOACK AND	)	
CAROLYN S. NOACK	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CIVIL ACTION**
	)	**NO. H-89-3335**
STATE FARM FIRE AND	)	
CASUALTY COMPANY	)	
	)	
Defendant.	)	

MEMORANDUM

Plaintiffs seek extra-contractual damages originating from an alleged delay in the processing and payment of their insurance claim. Pending before the Court is the Motion to Remand (Instrument No. 18) submitted by Plaintiffs C. Louis Noack and Carolyn S. Noack. Also pending before the court the Motion for Summary Judgment (Instrument No. 21) filed by Defendant Jimmy Young. Defendant State Farm Fire & Casualty Co. ("State Farm") joined in that motion on March

20, 1992. Having considered the motions, the responses, and the applicable law, this Court is of the opinion that plaintiffs' motion to remand should be denied inasmuch as a cause of action cannot lie against Jimmy Young, and that defendants motion for summary judgment should be granted.

I. STATEMENT OF FACTS

Plaintiffs bring this action in order to recover extra-contractual damages for breach of the common law duty of good faith and fair dealing and violations of the Texas Deceptive Trade Practices Act arising from the manner in which their claim for insurance proceeds was handled and resolved by State Farm.

This action was commenced on September 5, 1989, in the 190th Judicial District Court of Harris County, Texas. On September 28, 1989, State Farm timely removed the action, invoking this Court's diversity jurisdiction pursuant to 28 U.S.C. §1332. On October 17, 1990, plaintiffs were granted leave to amend their complaint. The amended complaint named Jimmy Young, primary adjuster for State Farm and a non-diverse party, as a defendant in the action. The plaintiffs subsequently filed a motion to remand. The defendants oppose the motion by maintaining that there has been a fraudulent joinder of Young to strip this Court of its diversity jurisdiction.

Young asserts that this action should not be remanded in that no cause of action can be asserted against him in state court in light of the fact that the two year statute of limitations period has run before he was named as a party to this action. Young contends that assuming *arguendo* that the limitations period has not run the plaintiffs have no cause of action against him inasmuch as they signed a release settling all their claims against State Farm and its adjusters.

Plaintiffs reply insisting that this Court must remand the action because it has no jurisdiction to determine whether a cause of action exists against Young.

This Court will first determine whether a fraudulent joinder has occurred; necessary to that decision is a determination of whether plaintiffs have a valid cause of action against Young. Therefore this Court must determine whether a possibility of recovery exists against Young. If no cause of action can lie against Young because of a purported release signed by the plaintiffs this Court has and may issue a ruling the defendants' motion for summary judgment.

II. DISCUSSION

1. *Fraudulent Joinder*

A. Standard of Review

The doctrine of "fraudulent joinder" was a judicial pronouncement intended to protect non-resident defendants from any misstatement of facts, misjoinder of parties, or causes of action knowingly made by plaintiffs for the purpose of conferring jurisdiction upon or defeating removal to the Federal Court. *Bentley v. Halliburton Oil Well Cementing Co.*, 174 F.2d 788 (5th Cir. 1949). The burden of proving fraudulent joinder in support of a petition for removal is a heavy one, and the removing party must prove that there is absolutely no possibility that plaintiff will be able to establish a cause of action against the in-state defendant in state court, or that there has been outright fraud in plaintiff's pleadings of jurisdictional facts. *Green v. Amerada Hess Corp.*, 707 F.2d 201 (5th Cir. 1983), *cert. denied*, 464 U.S. 1039 (1984).

Where the removing party grounds its allegations of fraudulent joinder upon the theory that the plaintiff cannot recover from the in-state defendants as a matter of law, the Fifth Circuit has set out the standard to be applied:

> The district court must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff ..... Moreover, the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff ..... If, having assumed all of the facts set forth by the plaintiff to be true and having resolved all uncertainties as to state substantive law against the defendants, the district court should find that there is no possibility of a valid cause of action being set forth against the in-state defendant(s), only then can it be said that there has been a "fraudulent joinder."

B., Inc. V. Miller Brewing Co., 663 F.2d 545, 549-50 (5th Cir. 1981) (citations omitted).

The Court should not premise the issue of fraudulent joinder on the probability of plaintiff's prevailing on the merits, but only look for the "modicum of sturdiness" for the possibility of recovery. *See generally Green v. Amerada*, 707 F.2d at 204-05. If that possibility exists, then "a good faith assertion of such an expectancy in a state court is not a sham ... and is not fraudulent in fact or in law." *B., Inc. v. Miller Brewing Co.*, 663 F.2d at 550 (quoting *Bobby Jones Garden Apartments v. Suleski*, 391 F.2d 172, 177 (5th Cir. 1968)). Therefore, for there to exist a fraudulent

joinder the Court must find that absolutely no possibility of recovery remains against the in-state defendant Mason. *See generally Green v. Amerada*, 707 F.2d at 206. In other words, for the doctrine of fraudulent joinder to apply

> [I]t [must] be clear that there can be no recovery under the law of the state on the cause alleged, or on the facts in view of the law as they exist when the petition for remand is heard.

Parks v. New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962), *cert. denied*, 376 U.S. 949 (1964).

2. *The Applicable Law*

Under Texas law, insurance policies are to be liberally construed in favor of the insured, any uncertain language is to be interpreted to avoid forfeiture or diminution of a policy's benefits. *Travelers Indem. Co. of Rhode Island v. Lucas*, 678 S.W.2d 732 (Tex.App. -- Texarkana 1989, no writ).

An insurance company may violate its common law duty of good faith and fair dealing by failing to promptly pay a claim when liability becomes reasonably clear. *Vail v. Texas Farm Bureau Mutual Insur. Co.*, 754 S.W.2d 129, 135 (Tex. 1988); *Aranda v. Insur. Co. of North America*, 748 S.W.2d 210, 212-13 (Tex. 1988). A cause of action for breach of that duty exists where there is no reasonable basis for a denial of a claim or when the insurer fails or delays to determine whether there is any reasonable basis for a denial of the claim. *Arnold v. National County Mutual Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987) *modified on other*

grounds Murry v. San Jacinto Agency, 800 S.W.2d 826, 829 (Tex. 1990) (limitations holding modified). In order to sustain a claim for breach of good faith, the insured must establish (1) the absence of a reasonable basis for denying or delaying payment of the claim and (2) that the insurer knew, or should have known, that there existed no reasonable basis for denying or delaying payment of the claim. *Aranda v. Insur. Co. of North America*, 748 S.W.2d at 213.

Violations of a duty of good faith and fair dealing may also constitute a violation of §17.46 of the Texas Deceptive Trade Practices Act and article 21.21, §16 of the Texas Insurance Code. *Vail*, 754 S.W.2d at 131-35, 147; *Allied General Agency, Inc. v. Moody*, 788 S.W.2d 601, 604 (Tex. App. --Dallas 1990, writ denied).

In order to determine what inferences can be drawn from a delay and refusal to pay, the court must look at the circumstances that surround the matter. A failure to pay after sufficient time for an investigation has taken place can only be evidence of malice or gross negligence if the failure is arbitrary and capricious. However, if a genuine controversy existed, "this will suffice as a reason for the failure of the insurer to make prompt payment. *Nat. Union Fire Ins. v. Hudson Energy*, 780 S.W.2d 417, 426 (Tex. App. --Texarkana 1989), *aff'd* 811 S.W.2d 552 (Tex. 1991) (citing *McCauley v. Boston Old Colony Ins. Co.*, 256 S.E.2d 19 (Ga.Ct.App. 1979)).[1]

a. standing

Plaintiffs have no standing to bring this action.

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[1]Although, this Court believes that a genuine controversy existed the Court makes no ruling on this point, rather, this Court's determination is limited to those grounds stated below.

The plaintiffs to this action signed two releases dated June 14, 1988 and August 3, 1988. Harmonizing the terms of those releases [2] this Court is compelled to find that the right of action was conveyed without reservation. This decision stems from the plain language of the release agreement. *See* Def.'s Mot. for Summ. J. Ex. C at p. 7.[3]

b. Limitations

On September 18, 1989, plaintiffs initiated action in state court arising from the insurers dilatory processing of insurance claims stemming from a fire of October 14, 1987.

On June 14, 1988, plaintiffs executed a "Release In Full" settling all of their claims against State Farm and its adjusters. On August 3, 1988 plaintiffs executed a settlement of all claims or potential claims against State Farm and its adjusters except for "Additional Living Expenses." Plaintiff's argue that the releases of June 14 and August 3 are not all encompassing releases in that State Farm presented them with a release on August 1, 1988, which they failed to execute. The release specifically dealt with the release of any extra-contractual, tort and DPTA claims.

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[2]A thorough review of the relevant releases is had below.

[3]Plaintiffs have not raised the allegation of fraud in the inducement or claim of duress with respect to the release. Plaintiff cannot attempt to raise those claims now as any delay in raising those claims is fatal. The United States Supreme Court has noted that the duress defense must be raised soon after the coercion is applied; in a case involving a negotiated agreement between parties represented by counsel the delay is itself compelling evidence that there was in fact no duress. *See Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 653 (Ct. Cl. 1981) (citing *Silliman v. United States*, 101 U.S. (11 Otto) 465 (1879)).

For limitations purposes, a cause of action accrues at the time when facts come into existence which authorize a claimant to seek judicial remedies, *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990) (citing *Robinson v. Weaver*, 550 S.W.2d 18, 19 (Tex. 1977)). or when an insurance company denies a claim the cause of action appropriately begins to run at denial. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828-829. However, if an insurance company "strings" an insured along without denying or paying a Claim, limitations will be tolled. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 828 n.2. In the case at hand, although it may be argued that plaintiffs were strung along, that activity ceased when all but claims for additional living expenses were settled on August 3, 1988. Young was not on notice that he could be a party to this action until September 13, 1990, more than two years after a cause of action against him accrued. *Murry v. San Jacinto Agency, Inc.*, 800 S.W.2d at 827. The action against Young is barred.

There exists an additional, independent reason for the denial of the motion to remand.

c. Release and Settlement

Settlement releases apply to almost any action. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1310 (5th Cir. 1983). A adequately drawn release will bar an action. *Ingram Corp. v. J. Ray McDermott & Co., Inc.*, 698 F.2d at 1313 (citations omitted).

The release of June 14, 1988, stated in relevant part:

> WHEREAS, acceptance of this release and payment of the consideration hereunder are

> merely a compromise and settlement agreement of disputed claims which have been made or *which might otherwise hereafter be made* by Clarence Louis Noack, Jr. and Carolyn Noack ... against State Farm regarding the contents loss, by which State Farm is *forever buying* its peace as to claims or potential claims of Clarence Louis Noack, Jr. and Carolyn Noack for contents loss.
>
> * * *
>
> ... Clarence Louis Noack, Jr. and Carolyn Noack... fully RELEASE ... State Farm ... as well as [its] adjusters ... from, and against all claims, demands, rights, and causes of action whatsoever nature which Clarence Louis Noack, Jr. and Carolyn Noack have or may have for themselves ....
>
> * * *
>
> ... to the extent that Clarence Louis Noack, Jr. and Carolyn Noack have any remaining claims, cause, or causes of action relating to or *arising from, directly or indirectly*, the contents loss, *all such remaining claims are hereby fully and forever CONVEYED, SOLD, TRANSFERRED, and ASSIGNED to State Farm*, without reservation, for the consideration heretofore recited.

Def.'s Mot. for Summ. J. Ex. B at pp. 2-6 (italics supplied, emphasis original).

The release dated August 3, 1988, recited essentially the same terms as the release of June 3 but allowed the Noacks to retain a claim for "Additional Living Expenses" should they so desire. Def.'s Mot. for Summ. J. Ex. B at p. 2.

Plaintiffs assert the notion, supported only by parol evidence, that if the parties intended for the June 14th release to be all encompassing, then State Farm would not have asked plaintiffs to sign the more specific release on August 1, 1988, or allowed them to seek compensation for "Additional Living Expenses" under the release of August 3, 1988.

The Noacks claim that the release of August 1 went unsigned specifically because it contained language barring an action for breach of good faith duty and for violations of the DPTA. The plaintiffs argue that this establishes that both State Farm and the plaintiffs had no intention to relinquish their rights to other causes of action. The plain terms of the releases of June 14 and August 3 clearly demonstrate that the Noacks released and conveyed the right to bring further actions.

These plaintiffs' arguments are unpersuasive. This Court cannot impose a liability on State Farm after valid releases were executed. State Farm merely attempted to bolster its position or executed the additional release in order to accommodate an opposing party. The terms of the August 3 release state that it is "merely a compromise and settlement" and that was "in no way an admission of ... liability." Def.'s Mot. for Summ. J. Ex. C at pp. 1-2.[4]

Moreover, the terms of the releases dictate this result. Texas law is clear. "The courts will enforce an unambiguous instrument as written; and in an ordinary case, the writing alone will be deemed to express the intention of

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[4]Plaintiffs' argue, although not stated as such, that there was a waiver of the first release. In order to be valid, however, the waiver must be a knowing waiver; the language of the release supports this Court's finding that there was no waiver of the June 14th release.

the parties." *Sun Oil Company (Delaware) v. Madeley*, 626 S.W.2d 726, 728 (Tex. 1981). *See also Cherokee Water Company v. Forderhause*, 641 S.W.2d 522 (Tex. 1982);

Aetna Life and Casualty Company v. Gunn, 628 S.W.2d 758 (Tex. 1982).

If a contract has certain and definite meaning then it is not ambiguous and the Court must construe the contract according to its terms. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983). This Court must ascertain the true intentions of the parties as expressed in the instrument. *Id.*

The admission of explanatory extrinsic evidence depends on whether the court finds as a matter of law that a written instrument is ambiguous. *Isbell v. Williams*, 738 S.W.2d 20, 24 (Tex.App. --Texarkana 1987, writ ref'd n.r.e.); *Reilly v. Rangers Management, Inc.*, 727 S.W.2d 527, 527 (Tex. 1987); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d 557, 561 (Tex.App. --Corpus Christi 1983, writ ref'd n.r.e.).

The interpretation of a contract becomes a fact issue for the jury only when, after application of the pertinent rules of construction, there remains a genuine uncertainty as to which of two meanings is proper. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979). This is so as Texas courts have repeatedly declared that the question of whether a contract is ambiguous is one of law for determination by the court. *See e.g., R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex. 1980); *Coker v. Coker*, at 394.

There are other meanings of ambiguity. A contract may be ambiguous if its meaning is "uncertain and doubtful." *Skyland Developers v. Sky Harbor Associates*,

586 S.W.2d 564, 568 (Tex.Civ.App. -- Corpus Christi 1979, no writ); *Walter E. Heller & Co. v. Allen*, 412 S.W.2d 712, 718 (Tex.Civ.App.-- Corpus Christi 1967, writ ref's n.r.e.) (guarantor liability). A written instrument may be ambiguous if it is "difficult to comprehend or distinguish, [or] of doubtful import," as there is "doubt as to [its] true meaning." *See San Antonio Life Insurance Co. v. Griffith*, 185 S.W. 335 (Tex.Civ.App. -- Fort Worth 1916, no writ); *O'Shea v. Coronado Transmission Co.*, 656 S.W.2d at 561; *see also Goff v. Southmost Sav. & Loan Ass'n*, 758 S.W.2d 822, 825 (Tex.App. -- Corpus Christi 1988. writ denied).

The principal purpose of contract construction is to ascertain the intentions of the parties. Therefore, contracts must be construed from a "utilitarian standpoint bearing in mind the particular business activity sought to be served ..." *Neece v. A.A.A. Realty Co.*, 322 S.W.2d 597, 602 (Tex. 1959); *see also Skyland Developers v. Sky Harbor Associates*, 586 S.W.2d at 570.

Courts must give effect to the objective, not subjective, intent of the parties as it is expressed in writing, as that intent control the contract's construction. *Westwind Exploration, Inc. v. Homestate Sav. Ass'n*, 696 S.W.2d 378 (Tex 1985).

This Court must harmonize and give effect to all the provisions of the contract so that none of the writing will be meaningless. *Chapman v. Orange Rice Milling Co.*, 747 F.2d 981, 983 (5th Cir. 1984); *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). If the provisions in the contract appear to conflict, they should be adapted to reflect the true intentions of the parties. *Ogden v. Dickenson State Bank*, 662 S.W.2d 330, 332 (Tex. 1983). This Court must give weight to each portion of the contract unless there is an irreconcilable conflict. *Id.* Moreover, no

single provision taken alone will be given controlling effect; rather, all provisions must be considered with reference to the whole instrument. *Coker v. Coker*, 650 S.W.2d at 393;

Bush v. Brunswick Corp., 783 S.W.2d 724, 728 (Tex.App. -- Fort Worth 1989, writ denied).

Both releases, and in particular the later release, contained language that unambiguously states that State Farm is "forever buying the peace as to all claims or potential claims." Even without reference to specific claims the language of the release clearly denotes that State Farm would be released from all potential claims. This suit is clearly barred under the terms of the release.

A releasor cannot complain that he or she was ignorant of, or mistaken about the contents of the release, or failed to read it before signing where the signed release itself clearly states that it was read and understood by the releasor. *See Torchia v. Aetna Cas. & Sur. Co.*, 804 S.W.2d 219, 222-24 (Tex.App. -- El Paso 1991, writ denied) (facts similar to the case at hand, claimant released insurer and court determined settlement was fair.)

Clearly, plaintiffs do not have a valid cause of action against Jimmy Young; plaintiffs' motion to remand should be denied. This Court will not address the defendants' motion for summary judgment.

2. Summary Judgment

A. *Standard of Review*

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Williams v. Adams*, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. *See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. *Id.*

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See Celotex*, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must set forth specific facts showing the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a notion for summary judgment. *Williams v. Weber Management Serv.*, 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere

allegations are insufficient. *Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden *Anderson*, 477 U.S. at 254. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. *Honore v. Douglas*, 833 F.2d 565. 567 (5th Cir. 1987).

2. The Applicable Law

In light of this Court's interpretation of the relevant settlement and release agreements this Court concludes, for the reasons set forth above, that plaintiffs do not have standing to sue in this matter having conveyed that right to State Farm.

Additionally, the release agreement was effective against all potential claims that could be raised, this

broad terminology plainly applies to claims arising in tort and under the DPTA. Defendants' motion for summary judgment should be granted.

III. CONCLUSION

This Court, having considered the other contentions presented concludes, for the reason set forth above, that plaintiffs' motion to remand should be denied and that defendants' motion for summary judgment should be granted. Any other motions before the Court are now MOOT.

Signed at Houston, Texas, this 31st day of March, 1992.

-/s/ Melinda Harmon
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

Respectfully submitted,